Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Federal-State Joint Board on Universal Service	)	CC Docket 96-45
	)	
Schools and Libraries Universal Service Support Mechanism	))	CC Docket No. 02-6

Request for Review and Petition for Waiver For Pueblo School District 60

Pueblo School District 60 (PSD 60) respectfully submits this request for review of two related decisions by the Schools and Libraries Division of the Universal Service Administrative Company. In these decisions, the SLD denied funding to PSD 60 for a network designed to connect all of the schools in the district to high speed Internet connections, based on an alleged violation of the competitive bidding requirements of the Universal Service Program for Schools and Libraries. We ask that the Commission overturn the June 7, 2005 denial of FRN 1146348 from Form 471 number 416616, and the June 27, 2005 denial of FRN 1225335 from Form 471 number 444063.

In the alternative, we request that, should the Commission determine that there was a violation of the competitive bidding requirements for the Schools and Libraries Program, the Commission waive its rules in this matter since any violation that may have occurred was not significant in nature and did not substantively affect the outcome of the competitive bidding process undertaken by PSD 60.

I. Background

Pueblo School District 60 serves 36 schools located in Pueblo, Colorado, a town of 110,000 located in the southeastern part of the state. PSD 60 had been examining its options for several years to build a new wide area network that would bring broadband services to all the schools in PSD 60, and had secured bond funding to help make this a reality. After considering and rejecting the possibility of building its own network, PSD 60 decided to request bids on leasing a WAN for the next 15 years that would grow with the needs of the students PSD 60 serves.

On December 5, 2003, PSD 60 released an RFP requesting bids from vendors interested in building a wide area network serving the schools in PSD 60. The RFP was posted on the Internet and in the local newspaper, The Pueblo Chieftain. The RFP was explicit in the services sought, how vendors should respond to the RFP, and the factors that would be used to evaluate the RFPs. An accompanying Form 470 for Fund Year 2004 (number 197380000475497), was filed on December 14, 2003, which included a hypertext link to the RFP.

PSD 60 received four bids in response to the RFP. After waiting the necessary 28 days, and undertaking a careful review and evaluation of the four bids, PSD 60 selected the lowest cost bid. A 15-year contract with that bidder, ExOp of Missouri, Inc. (d/b/a Unite), was signed on January 27, 2004. Form 471 number 416616 was filed in accordance with program rules on February 2, 2004.

PSD 60 was selected for an extensive PIA service review prior to the SLD making the funding commitment. In the course of that review – in which literally hundreds of pages of documentation were supplied demonstrating that the bid process had been legally undertaken, that the school district had secured appropriate funding to pay the non-discounted portion of the cost of the service, and that all the other resources necessary to make use of the network had been secured – the SLD requested and received a copy of the bid evaluation criteria that had been used to evaluate responses to the RFP. This review process took an entire year, during which PSD 60 and ExOp began building the network, and during which PSD 60 filed their Form 471 for Funding Year 2005. In the Funding Year 2005 Form 471, PSD 60 cited the original Funding Year 2004 Form 470 as the establishing Form 470.

More than sixteen months after the Funding Year 2004 Form 471 had been filed, and 4 months after the Funding Year 2005 Form 471 had been filed, the SLD issued a funding commitment decision letter on June 7, 2005, for the Funding Year 2004 application in which they rejected the funding request, declaring that a bidding violation had occurred because the "[d]ocumentation provided demonstrates that price was not the primary factor in selecting this service provider's proposal." On June 27, 2005, the SLD issued the funding commitment decision letter for the Funding Year 2005 request, in which they rejected the Funding Year 2005 FRN, stating that the "[d]ocumentation provided demonstrates that price was not the primary factor in selecting this service provider's proposal – based on denial for year 7 application."

The basis for the SLD's decision in this matter was the methodology used to evaluate the various bids. In the course of the bid evaluation, PSD 60 set out a number of different criteria that would be used to evaluate each of the bids. Those criteria and their relative values are included in table 1, which appears below.

Evaluation Criteria	***Value***
Vendor Met Basic Bid Requirements, including: Required Bid Bond with RFP Response Required Signature Sheet Response submitted in Required Format	30
Vendor Offered Required 15 Year Term	20
Financial Response	30
Technical Response	30
Value Add Response	30
District's Past Experience with Vendor	10
Maintenance/Service Components of Response	20
Vendor Staffing – Technical and Administrative	20
Vendor Proximity to District	10
TOTAL	200

TABLE 1: BID EVALUATION CRITERIA

In this evaluation matrix, "price" (labeled "financial") is given the greatest weight of any category, but several other categories are also given the same weight.

II. Request for Reversal of SLD Decision Because PSD 60 Complied with Competitive Bidding Rules in Place at the Time of its RFP

PSD 60 holds that the SLD's decision to deny it funding for Funding Years 2004 and 2005 was in error because PSD 60 complied fully with the competitive bidding rules in place at the time that it initiated its RFP for eligible services. Therefore, we request that the Commission reverse the SLD's denial of funding for USD 60 for Funding Years 2004 and 2005.

From the inception of the E-Rate program until December 8, 2003, the date of the Ysleta order, the program' s competitive bidding rules stated that "cost-effectiveness" was of major importance in applicants selecting a service provider.[1] However, great confusion reigned among applicants about whether price of services was "the primary factor" or "a primary factor" amongst other primary factors. Indeed, some portion of this confusion can be attributed to the Commission's Tennessee Order, in which it stated at various points that "price was the primary factor" and "price was a primary factor."[2] In the Ysleta order, the Commission itself acknowledged that its "use of varying phraseology in the same decision created some ambiguity on this issue." [3]

Because of confusion in the applicant community over whether price was "a primary factor" or "the primary factor" before the Ysleta order, applicants were left uncertain how to establish fair competitive bidding processes that accurately weighed price and other bid components. Lacking clear guidance during the first several years of the program, applicants adopted a number of different approaches to meet this requirement.

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1 See *Report and Order in the Matter of Federal-State Joint Board on Universal Service*, FCC 97-157, ¶481, p.249, released May 8, 1997.

2 Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, (1999), hereinafter the Tennessee Order.

3 See *Order in the Matter of Request for Review of the Deecision of the Universal Service Administrator by Ysleta Independent School District (et. al.)*, FCC 03-313, ¶50 (and footnote 138), p. 24, released December 8, 2003, hereinafter the *Ysleta Order*.

In fact, it was not until the Commission's *Ysleta Order* that the Commission clarified that, in any bid evaluation, price must be weighed more heavily than any other factor.[4] In the *Ysleta Order*, the Commission unambiguously stated for the first time that applicants could consider a multiplicity of factors and criteria in evaluating bid responses, but of those factors, price must weigh more heavily than any other single factor.

Unfortunately, this clarification came too late for PSD 60. Weeks before the Commission promulgated the *Ysleta Order*, PSD 60 staff designed a competitive bidding application process that included a 200-point scoring system. Under that system and not in contravention of current program guidelines, PSD 60 deemed price "a primary factor," rated at 30 points of the total, and scored three other categories at the same level. On December 5, three days before the release of the Ysleta order and still operating under the admittedly unclear, pre-Ysleta competitive bidding guidelines, PSD 60 released its RFP for services. Barely one month after the release of the Ysleta order, PSD 60 completed its competitive bidding process, awarding a contract to the lowest priced bidder.

Given the close timing of the Ysleta order's release vis a vis the timing of critical elements of PSD 60's bid evaluation process, we assert that PSD 60's Funding Year 2004 application was governed and should be considered to be governed by pre-Ysleta guidelines. Additionally, we assert that since PSD 60's Funding Year 2005 application is inextricably linked to the Funding Year 2004 request, we assert that it, too, should be governed and considered to be governed by pre-Ysleta guidelines. Moreover, as PSD 60's competitive bidding scoring system and its choice of the lowest price bidder plainly show that it considered price to be a primary factor, we assert that Ysleta complied fully with the competitive bidding rules in force before the release of the Ysleta order. On these grounds, we request that the Commission reverse the SLD's decision to deny E-Rate support to PSD 60 for Funding Years 2004 and 2005.

4 See *Order in the Matter of Request for Review of the Deecision of the Universal Service Administrator by Ysleta Independent School District (et. al.)*, FCC 03-313, ¶50 (and footnote 138), p. 25, released December 8, 2003, hereinafter the *Ysleta Order*,

III. Request for Reversal of SLD Decision Because PSD 60 Chose the Lowest Priced Vendor

Regardless of whether PSD 60's competitive bidding compliance is measured according to pre-Ysleta rules or according to the current competitive bidding rules, we submit that PSD 60 substantially complied with both sets of rules by choosing the lowest priced provider for the services requested. Therefore, we request that the Commission reverse the SLD's denial of funding for USD 60 for Funding Years 2004 and 2005.

Since the program's beginning, the Commission and SLD have focused extensively on the issue of price in the competitive bidding process. The Federal State Joint Board on Universal Service's original Recommendations on the establishment of the program, the Commission's first universal service order, and the Tennessee and Ysleta orders all addressed whether and to what extent applicants must take cost effectiveness into consideration when reviewing and awarding competitive bids. The reason for the focus on price is simple – E-Rate and universal fund support is not limitless and the lower the price that applicants pay for eligible services, the more universal service support will be available for other deserving applicants. In fact, a number of program critics have complained about applicants "gold-plating" their applications by seeking School and Library Program support for unnecessarily expensive services. Thus, it is with good justification that the Commission and the SLD take steps to ensure that applicants keep cost-effectiveness uppermost in their minds when awarding competitive bids.

Based on the factual record, there is no question that PSD 60 was concerned about price in its competitive bidding process – assigning it the highest point value in its competitive bidding scoring – and, most importantly, awarding its contract to the vendor that submitted the lowest price bid. In response to its RFP, PSD 60 received four bids. According to the summary analysis of the bids (which appears below and was included in the original appeal to the SLD), the winning bidder, ExOp of Missouri/Unite, bid nearly $120,000 less than its nearest rival (Secom) and was less than half the cost of the two remaining bidders (Qwest and Comcast). Under any analysis of USD 60's competitive bidding process, its award of a contract to ExOp fulfilled to the letter the program's pre-Ysleta rules and was in keeping with the spirit of the current competitive bidding rules.

	ExOp of Missouri/ Unite	*Secom*	*Qwest*	*Comcast*
Non Recurring Costs	$3,989,663	$3,750,017	$49,200	$1,450,000
Monthly Recurring for 48 months	$3,759	----	----	----
Monthly Recurring for 132 months	$15,000	----	----	----
Monthly Recurring for 180 months	----	$14,000	$71,430	$70,000
Contract Term Total in Months	180	180	180	180
Total Term Cost	**$6,150,095**	**$6,270,017**	**$12,906,600**	**$14,050,000**

TABLE 2: SUMMARY OF BID RESPONSES[5]

Beyond the mere fact that PSD 60 awarded the contract to the lowest bidder, an analysis of the two closest bids demonstrates that price was a principal reason that ExOp prevailed over Secom. ExOp's total score from the compiled evaluations was 877 points, while Secom's total was 620 points. In the "financial" category, which is the price factor, ExOp's score (138 points) was more than double Secom's (63 points). Based on this, it is clear that if USD 60 had used price as the only determinant for awarding the bid, ExOp would have easily outpaced Secom in scoring as well as actual price.

Even more interesting is the fact that had USD 60 accorded price a higher share of the total scoring, ExOp would still have received the award. In fact, under virtually any competitive bidding scenario that could be devised based on the Commission's competitive bidding requirements, the outcome of the vendor selection process would have been the same. The reason for this is that ExOp

5 ExOp of Missouri/Unite submitted a bid with differentiated pricing for the first 48 months and then the following 132 months. Each of the other bidders submitted bids with a single price for the entire 180 months covered under the RFP.

scored the same or higher than the other bidders in every single category of bid evaluation except for the "Staff – Technical and Admin" category.

In sum, while PSD 60 may not have designed its competitive bidding process precisely as the Commission outlined in the Ysleta order (which was released after PSD 60 had initiated the bidding process), PSD 60 still achieved the correct result from its and the Commission's perspective: it received four substantive bids to provide services and selected the most cost-effective (and lowest priced) alternative. We urge the Commission to take into account PSD 60's emphasis on price in its scoring system and bid analysis and, most importantly, its award to the lowest price bidder and reverse the SLD's funding denial for Funding Years 2004 and 2005.

IV. Petition for Waiver

In the alternative to granting a reversal of SLD's denial of funding to PSD 60 on the merits, we believe that ample "good cause" exists for the Commission to voluntarily waive its competitive bidding rules in this instance. As outlined in Title 47, Chapter 1, Part 1, Section 1.3 of Commission rules, the Commission may waive its rules on its own motion or on petition. Section 1.3 of the Commission's rules provides that the Commission may waive its rules for "good cause" shown.[6] Generally, a waiver is appropriate if "special circumstances warrant deviation from the general rule and such deviation will serve the public interest,"[7] particularly where, as here, the relief requested would not undermine the policy objective of the rule in question.[8] Because of the important "safety valve" function that waivers perform, it is well established that the Commission must give requests for waivers a "hard look."[9]

PSD 60 asserts a waiver of the program's current competitive bidding rules is warranted in this case because special and largely unique circumstances exist. The release of the Ysleta order on

[6] 47 CFR Section 1.3.
[7] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).
[8] WAIT Radio, 418 F.2d at 1157.
[9] Id.

December 8, 2003 unfortunately left PSD 60's competitive bidding process straddling two different competitive bidding eras: pre-Ysleta, where cost could be considered as "a primary factor," and post-Ysleta, where it must be "the primary factor." When PSD 60 designed its competitive bidding process and disseminated its RFP for Funding Year 2004 prior to December 8, 2003, its process was it full compliance with the program's pre-Ysleta rules. When it reviewed the competitive bids received and settled on a vendor, it did so less than one month after the Ysleta order's release, making it impossible for PSD 60 review and interpret the order's conclusions and adjust PSD 60's competitive bidding process scoring accordingly. For PSD 60, the timing of the release of the Ysleta order was disastrous.

Despite being caught in a timing problem through no fault of its own, PSD 60 still awarded a contract to the lowest priced vendor, as is described more fully in the Petition for Review portion of this filing. Thus, it managed to satisfy the policy objectives of both competitive bidding eras: ensuring that applicants gave primary importance to price in the competitive bidding process.

PSD 60 also asserts that a waiver in this instance would be manifestly in the public interest because it would ensure that the students served by PSD 60 can continue to be connected to the multiplicity of learning resources available on the Internet. If the Commission does not waive the rules in this case and allows the denial to stand, there will be a significant harm to the public interest – and specifically to the students of PSD 60. By denying E-Rate funding for Funding Years 2004 and 2005, the Commission would effectively be denying E-Rate funding for the duration of the contract between PSD 60 and ExOp. In order to ensure that a low cost was achieved, PSD 60 signed a 15-year contract with ExOp, meaning that a denial of Funding Year 2004 and Funding Year 2005 funding would effectively deny PSD 60 funding on their wide area network through Funding Year 2019. The tremendous financial costs that will thereby be shifted onto the district will cause significant hardship to the district, causing them to cut back on other educational services. We therefore believe that providing a waiver from the rules in this instance is needed to ensure that PSD 60's students are not denied Internet or other educational services.

Finally, PSD 60 asserts that waiving the rules in this case would not set a precedent that would detract from the Commission's efforts to reduce waste, fraud, and abuse. Indeed, the record clearly shows that PSD 60 was not attempting to defraud the Commission or otherwise take advantage of the system. Unlike the facts that were presented in the Ysleta case, where a full and open bid process was not conducted, PSD 60's bid process was full, open, and public, with all the services sought clearly identified in their RFP. PSD 60's bid process was not tainted by inappropriate involvement with service providers. PSD 60 complied not only with all applicable state and local procurement practices, but also complied with the applicable requirements for the Schools and Libraries Program in force at the time of the bid's release.

In this instance, we believe that it is clear PSD 60 reached the right result, although the process may have been slightly flawed from an E-Rate compliance perspective. PSD 60 went through an extensive competitive bidding process, which included a published RFP, extensive specifications for the network, and multiple bids, and an evaluation process that was undertaken in good faith and in a fashion that, but for the weighting, would have been compliant with all program rules. Indeed, had the weighting been done in a manner that was fully compliant with the Ysleta order, the outcome would have been the same. Therefore, should the Commission determine that the PSD 60 was not in compliance with the requirements of the E-Rate program and deny the request for review, above, we ask that the competitive bidding requirement that price be weighted more heavily than any other factor be waived in this instance.

Conclusion

For the reasons discussed above, we ask that the Commission either determine that PSD 60 was not in violation of the program rules, or that the program requirement that price be weighted more heavily than any other factor be waived, and that the SLD be instructed to process the funding requests listed above with all appropriate speed.

Respectfully submitted this 16th day of November, 2005.

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